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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 710

THE CELOTEX CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 15–20) is reported at 364 F.2d 552. The findings of fact, conclusions of law, and order of the Board (R. 53–90, 120–124)[1] are reported at 146 NLRB 48.

JURISDICTION

The decision of the court of appeals was entered on June 28, 1966; a petition for rehearing was denied on August 4, 1966; and the decree was entered on August 12, 1966 (Pet. App. 15, 21–23, 24). The peti-

[1] "R." refers to "Volume I, Transcript of Record," and "J.A." refers to the "Joint Appendix," filed in the court of appeals.

tion for a writ of certiorari was filed on October 21, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), are set forth at pp. 13–14 of the Appendix to the petition.

QUESTIONS PRESENTED

Whether, in the circumstances of this case, the employer violated his statutory obligation to bargain in good faith by:

1. Refusing during the course of contract negotiations to furnish the union with information about his financial status, where he had predicated bargaining demands for a reduction in certain employee benefits on the unprofitability of the plant's operations;

2. Terminating the existing procedure for adjusting grievances and instituting a new one, without first giving the union an adequate opportunity to bargain about the change.

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

1. *Refusal to furnish financial information.* Petitioner manufactures building materials in a number of States. Since 1941, the Union[2] has represented the production and maintenance workers at petitioner's largest plant, located in Marrero, Louisiana

[2] Oil, Chemical and Atomic Workers International Union, Local 4–179, AFL–CIO.

(R. 56; J.A. 103, 135, 144). At the time of the events herein, the parties had a collective bargaining agreement for a one-year term ending March 8, 1962, in which petitioner had agreed to job seniority and other provisions which substantially restricted its power to schedule work and make job assignments (R. 58; J.A. 171–179, 243–246). From the Union's standpoint, these restrictions were of substantial importance and had been obtained in collective bargaining over the years at the expense of other economic demands (R. 59; J.A. 246, 254).

In the December 7, 1961, issue of the Marrero plant newspaper, petitioner asserted that it wanted relief from these contractual restrictions because they generated "wasteful" amounts of premium overtime and incentive pay and other production costs. The Marrero plant, petitioner added, had been waging "a hard fight * * * for the past two years" and was in a "squeeze put on by intense competition * * * in our industry" (J.A. 171–179). Accordingly, on February 12, 1962, in the first bargaining session for a new contract, petitioner advanced proposals which had the effect of reducing premium overtime pay and the amount of seniority an employee could earn (J.A. 112, 149–150, 187–193, 217–218). Vice-President Strittmatter explained to the Union that competition and the Marrero plant's poor earnings picture necessitated such changes (R. 59, 60; J.A. 213). Union representative Zebal then asked "why there are no actual dollar figures, when you say you are losing money at Marrero. We have never been shown any figures that apply to the Marrero plant" (R. 60; J.A.

214). Strittmatter replied that net profit figures were not maintained for individual plants, "but from the figures that are available, we can say that * * * Marrero did not produce earnings in 1961" (R. 60; J.A. 214).* When Union representatives suggested alternative methods for reducing costs, Strittmatter replied that such methods would "cost money and with our profit picture as bad as it has been, we have not been able to do as much as we would like" (R. 60; J.A. 215–216).

At the bargaining session on the following day, Company representatives again referred to the "economic penalties" imposed by the restrictive provisions of the expiring contract (J.A. 229, 231–232), and asserted that they could not be ignored because "we are falling further behind at Marrero. Survival is involved. We have some directors that have actually advocated closing the Marrero operation down" (J.A. 229). Union negotiator Martinez replied: "All of us want to see this Company succeed, but we would like Management to understand that we have an obligation to our people—how far can we go? Both sides have to talk sincerely about both sides' problems" (J.A. 230).

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* Petitioner maintained net profit figures only for the corporation as a whole, calculated by subtracting general corporate costs from total gross profits received from all plants. Gross profit figures were maintained on a plant basis and were calculated by subtracting plant costs, such as wages, depreciation, and insurance, from plant sales. It was petitioner's policy that each of its plants should "stand on its own" and "absorb its proportionate share of general corporate costs" (R. 62–65; J.A. 136–142, 298–299).

At the February 19 bargaining session, Union representative Zebal complained to Strittmatter: "You continually say that Marrero is a sore spot" and "is losing money, but you won't give us any figures." Strittmatter replied that he did not say "Marrero was losing money," but that it "did not make money" (R. 60; J.A. 254–255). When Zebal asked whether the Company's Pittston plant was "in the same shape as Marrero," Strittmatter asserted, "Not at all. Pittston is a profitable operation" (J.A. 255). Palmer, the Union's principal representative, then asked how Marrero "far[ed] as to profit or loss last year." Strittmatter answered: "In this corporation we compute over-all results. We do not break down by plants." When Palmer further inquired how the Company knew "where the trouble was," Strittmatter said: "Our people know at certain operations, whether money has been made or not. On a gross profit basis we do know by plants. But not on a net profit basis." Palmer then asked for the gross profit figures for Marrero, but was told that "this is not information that would be available" (J.A. 257).

When Union representative Martinez suggested that Marrero could improve its profits by assigning more general corporate overhead to other plants, Strittmatter asserted, "CPA's set up how our overhead is distributed. We must set up our books as specified." He added that the Company president had "this message [for] you at Marrero * * * that the margin [of profit] at Marrero is the smallest it has ever been since the depression days." Martinez replied that he had "no quarrel with the fact that

business has been bad, but Marrero still may be making money. * * * Maybe we made a million and one-half at Marrero and [another plant] took up this money in their losses" (J.A. 258–259). Palmer then stated (J.A. 259):

> I have a request to make in behalf of the Union. We would like to have the financial figures at Marrero as to whether or not this plant made a profit, had a loss, or broke even last year.

Strittmatter replied (*ibid.*):

> This is information that you are not entitled to and the answer is no. The Company doesn't give out this information. * * *

In the February 21 negotiations, Strittmatter again referred to the "serious" economic condition at Marrero to support the Company's demands for removal of the restrictions contained in the expiring contract. Palmer replied that the Company was actually "arguing an inability to pay," and that, "if you are arguing for relief * * * in saying you must get your costs down because Marrero is in trouble, it would behoove you guys to show us some profit pictures for Marrero." When Strittmatter pointed out that he "only said that Marrero did not make any money last year," Palmer added, "You said you had a gross profit picture. You could show us this." Strittmatter then asserted that it was "corporation policy not to disclose these figures," and that the Company had "the ability to pay whatever we think is right to pay" but the problem remained "to get costs down" (R. 61; J.A. 269–270).

In a final negotiating meeting called by a federal mediator on May 1, 1962, Works Manager Dickson reiterated petitioner's position that "anything that results in cost penalties must be eliminated" and that "we must turn Marrero around [toward profits] or we could lose Marrero, or most of Marrero" (R. 61; J.A. 296–297). When Palmer indicated that his people could not be persuaded to accept petitioner's proposals without seeing the Marrero financial records, Dickson replied that "we maintain no profit picture by plant" and that "gross profit for Marrero was available but * * * was confidential and would not be given out" (R. 62; J.A. 297–298). After Dickson reaffirmed the Company's policy that each plant negotiated on its own, stood on its own, and had to absorb its proportionate share of corporate costs, Palmer said (J.A. 299):

> We would like to see that [gross profit picture]. You haven't convinced us that Marrero is in bad shape. If you can show us, then this Union will be willing to work with you to give relief.

2. *Unilateral changes in the grievance procedure.* The contract which expired on March 8, 1962, also contained a detailed grievance and arbitration procedure, under which grievances were first discussed between Union stewards or committeemen and Company foremen and then, if not settled, between Union agents and successively higher ranking Company officials. The employee involved could initiate and participate in the first step discussion if he so desired; in the succeeding steps, only the Union presented the

grievance (R. 60; J.A. 102, 163–169). During the negotiations for a new contract, the only change which petitioner proposed to make in this machinery was to reduce the number of members on the Union grievance committee (J.A. 192).

On March 27, while negotiations were suspended, petitioner "informed" two Union representatives that it was instituting its own grievance procedure because the contract had expired. Without discussion or bargaining, notice of the new procedure was posted that same day and amended the following day (R. 80–81; J.A. 95–96, 106–107). The Union's role in the new procedure was substantially diminished. Access to the grievance procedure was controlled by the complaining employee, and the Union could participate only if the employee desired (R. 81; J.A. 104–106).

B. THE DECISIONS OF THE BOARD AND THE COURT OF APPEALS

The Board found that petitioner, by basing its demands for concessions from the Union on the claim that the Marrero plant was in a poor competitive position and was not being operated profitably, was asserting a financial inability to continue paying existing wage costs. The Board further found that petitioner had meaningful financial information which it could have furnished the Union, and that, by refusing to do so, it violated its bargaining obligation under the Act (R. 64–65). The Board also found that petitioner's "unilateral establishment of a new and different [grievance] procedure was a change in terms and conditions of employment 'in derogation of

the Union's representative status,'" and thus a further violation of Section 8(a)(5) of the Act (R. 81). The Board ordered petitioner, *inter alia*, to cease and desist from the unfair labor practices found, and to furnish the Union, upon request, with all financial records which it "shall be entitled to see" (R. 88–89, 123).

The court of appeals sustained the Board's findings, and, with a modification not here pertinent, enforced its order (Pet. 15–20).

ARGUMENT

The decision of the court of appeals, which turns on the particular facts of this case, is correct and is not in conflict with the decision of any other circuit. There is no occasion for further review. *National Labor Relations Board* v. *American National Insurance Co.*, 343 U.S. 395, 409–410.

1. This Court has recognized that an employer violates his bargaining obligation under Section 8(a)(5) of the Act (Pet. App. 13) if, during the course of contract negotiations, he relies on his financial condition to support his demands for certain terms and conditions of employment, but refuses to furnish the bargaining representative with information which would enable it to evaluate and respond to the financial claim. *National Labor Relations Board* v. *Truitt Mfg. Co.*, 351 U.S. 149.[4] The Board and the court of ap-

[4] Accord: *National Labor Relations Board* v. *Jacobs Mfg. Co.*, 196 F. 2d 680, 684 (C.A. 2); *National Labor Relations Board* v. *Southland Cork Co.*, 342 F. 2d 702, 706 (C.A. 4); *National Labor Relations Board* v. *Taylor*, 338 F. 2d 1003 (C.A. 5), enforcing 141 NLRB 765, 766–767; *National Labor Relations Board* v. *Western Wirebound Box*, 356 F. 2d 88 (C.A. 9).

peals correctly applied this principle to the present case.

The question whether financial inability has been placed in issue by the employer is to be determined from all the circumstances. *National Labor Relations Board* v. *Taylor*, 338 F. 2d 1003 (C.A. 5), enforcing 141 NLRB 765, 766–767. In view of petitioner's repeated assertions that it had to cut labor costs because the Marrero plant was not competitive, had not made money and had a low profit margin (pp. 3–7, *supra*), the Board was warranted in concluding that the changes proposed were predicated upon its financial inability to continue under the existing contractual restrictions.[5] Contrary to petitioner (Pet. 7–9),

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Similarly, refusals to furnish wage data and related information, relevant to the intelligent performance of the bargaining representative's function, violate the Act. See, *e.g.*, *National Labor Relations Board* v. *F. W. Woolworth Co.*, 352 U.S. 938, reversing 235 F. 2d 319 (C.A. 9); *Sylvania Electric Products, Inc.* v. *National Labor Relations Board*, 358 F. 2d 591 (C.A. 1), certiorari denied, October 10, 1966, No. 373, this Term; *National Labor Relations Board* v. *Yawman & Erbe Mfg. Co.*, 187 F. 2d 947, 949 (C.A. 2).

[5] The cases relied upon by petitioner (Pet. 9) involved distinguishable factual situations. In *Dallas General Drivers, Local No. 745* v. *National Labor Relations Board*, 355 F. 2d 842 (C.A.D.C.), the company "agreed that it had a lucrative business" and urged only that it was "unable to get more business, because it was paying substantially more in wages than were its competitors" (151 NLRB 1359, 1360). And in *United Fire Proof Warehouse Co.* v. *National Labor Relations Board*, 356 F. 2d 494 (C.A. 7), the court found that the company's overall profit figures were irrelevant where it was merely contending that a wage cut was required to enable it to show a profit on the local-moving phase of its business and had, in fact, given the union the "figures relating to local moving" (*id.* at 495).

there was an adequate showing that the requested financial information was relevant. As in *Truitt,* the employer himself demonstrated its relevance by referring to the data in question to support his bargaining demands and by arguing, in effect, that he could not continue to pay the costs generated by the prior contract. See *Curtiss-Wright Corp.* v. *National Labor Relations Board,* 347 F. 2d 61, 69 (C.A. 3).

Petitioner admittedly possessed gross-profits data for the Marrero plant (see n. 3, *supra*), and the Union could have obtained further enlightenment on the issue of petitioner's ability to continue under the prior contractual restrictions by deducting Marrero's portion of the company-wide overhead from its gross profits (R. 65). The Board properly concluded that, by withholding this relevant and available information, the Company defaulted in its bargaining obligations.[6]

2. There is no merit in petitioner's contention that its termination of the prior grievance procedure and establishment of a new one was too "trivial" and "temporary" to constitute an unfair labor practice. Under the prior grievance procedure, the Union had

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[6] Contrary to petitioner (Pet. 8–9), the Union did not waive its right to the information. Such a waiver must be clear and unmistakable. See *National Labor Relations Board* v. *The Item Co.*, 220 F. 2d 956, 958–959 (C.A. 5), certiorari denied, 350 U.S. 836; *National Labor Relations Board* v. *Gulf Atlantic Warehouse Co.*, 291 F. 2d 475, 477 (C.A. 5); *Timken Roller Bearing Co.* v. *National Labor Relations Board*, 325 F. 2d 746, 751 (C.A. 6), certiorari denied, 376 U.S. 971. Here, the Union repeated its request numerous times up to and including the last bargaining session (R. 65–66; J.A. 214, 254–255, 258, 269, 297–299).

the right to participate in all discussions and controlled access to the higher stages of review. Under the procedure substituted by the Company, however, the employee could file grievances only with Company officials and the Union could participate in the discussions only if the employee so desired. The new procedure obviously was in derogation of the Union's role in adjusting grievances—a procedure which is "at the very heart of the system of industrial self-government." *Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581. The employer's action "minimize[d] the influence of organized bargaining * * * by emphasizing to the employees that there [was] no necessity for a collective bargaining agent." *May Department Stores Co.* v. *National Labor Relations Board*, 326 U.S. 376, 385. Even if temporary, the Company's action "must of necessity [have] obstruct[ed] bargaining." *National Labor Relations Board* v. *Katz*, 369 U.S. 736, 747.

Nor can petitioner rely on the existence of a general impasse to justify its unilateral action (Pet. 11). As the court below pointed out (Pet. App. 16–17), the Company's failure to bargain in good faith was a substantial cause of the impasse. Moreover, even a legitimate impasse cannot justify a unilateral change which is substantially different from proposals made in the bargaining prior to the impasse. Cf. *National Labor Relations Board* v. *Crompton-Highland Mills, Inc.*, 337 U.S. 217. Here, prior to March 27, 1962, the Company had suggested changing the grievance procedure only by reducing the number of grievance committeemen. On that date, it simply "informed" two

Union representatives that it was going to make the quite different changes discussed above; and, on the same day, it posted notice of the changes. "In this setting, it can hardly be said that the union was given the bargaining opportunity to which it is entitled under *N.L.R.B.* v. *Katz*, 369 U.S. 736 * * * and *N.L.R.B.* v. *Crompton-Highland Mills, Inc.*, 337 U.S. 217 * * *." *Industrial Union of Marine and Shipbuilding Workers* v. *National Labor Relations Board*, 320 F. 2d 615, 620 (C.A. 3), certiorari denied *sub nom. Bethlehem Steel Co.* v. *National Labor Relations Board*, 375 U.S. 984.[7]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
NORTON J. COME,
Associate General Counsel,
MALCOLM D. SCHULTZ,
Attorney,
National Labor Relations Board.

NOVEMBER 1966.

[7] The "similar advance notice" referred to by the Company (Pet. 11) related to an altogether different subject, insurance, which was extensively explored by the parties in their prior bargaining (see R. 121).

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